IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re RICHARD T. BROWN, JR., Debtor-Appellant	:	
	:	CIVIL ACTION No. 97-5302
	:	
	:	
	:	Bankruptcy No. 96-30290

MEMORANDUM AND ORDER

HUTTON, J. October 15, 1998

Presently before the Court are the Brief of the Appellant Richard T. Brown (Docket No. 5), Brief of Appellee United States Trustee (Docket No. 7), Reply Brief of Appellant (Docket No. 8), a second Brief of the Appellant (Docket No. 9), Brief of Appellee United Companies Lending Corporation (Docket No. 10), and a second Reply Brief of Appellant (Docket No. 12). For the reasons set forth below, the decisions of the United States Bankruptcy Court are **AFFIRMED**.

I. BACKGROUND

This case is an appeal from three orders and a final judgment of the United States Bankruptcy Court. The Appellant filed an appeal for each of these decisions by the Bankruptcy Court. This Court consolidated the four appeals, Civil Action Nos. 97-5302, 97-8011, 98-1352, and 98-1570, under the caption Civil Action No. 97-5302.

In July of 1996, Appellee United Companies Lending Corporation ("Appellee UCLC") granted Appellant and Debtor, Richard T. Brown ("Brown" or Appellant), a mortgage in residential property at 2428 Poplar Street, Philadelphia, Pennsylvania. As a part of this loan, Appellee UCLC charged Appellant approximately $5,000 in standard industry charges including loan origination points and settlement costs. Appellant made a few payments on the mortgage before it became in arrears. Appellant, an attorney and sole practitioner, simply did not have sufficient income to pay the mortgage. On October 24, 1996, the Appellant filed a Petition for Relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania.

Appellee UCLC filed a Motion for Relief from the automatic stay. Appellee UCLC wanted to exercise foreclosure remedies on the property. The Bankruptcy Court granted Appellee UCLC's motion for relief from the stay.

Appellant then sought to avoid certain fees connected with the mortgage and note by bringing an adversary action alleging that the mortgage was a fraudulent transfer under Section 548 of the Bankruptcy Code. Appellant argued that Appellant did not receive "reasonably equivalent value" for the standard industry loan charges paid in connection with the making of the loan. The Bankruptcy Court held a hearing and found that the mortgage was not fraudulent under the meaning of Section 548 of the Bankruptcy Code.

The Bankruptcy Court concluded that Appellant's argument was frivolous and, upon Appellee UCLC's motion, granted sanctions against Appellant for brining the action.

On April 4, 1997, Appellee United States Trustee filed a Motion to Dismiss or Convert the Chapter 11 case arguing that the Debtor: (1) failed to serve required monthly operating reports on the United States Trustee; (2) failed to file a disclosure statement and plan of reorganization; (3) was unable to effectuate a plan of reorganization (4) failed to comply with 28 U.S.C. § 1930(a)(6) requiring a payment of a quarterly fee; and (5) caused unreasonable delay that was prejudicial to the creditors in the case.[1] The Bankruptcy Court delayed a hearing on the motion numerous times to allow Appellant to file a Chapter 11 plan and Disclosure Statements. Appellant finally submitted a Chapter 11 plan and the required Disclosure Statements. The plan, however, was deficient on several levels. After several other delays, the Bankruptcy Court dismissed the case and held:

> The Court has examined the Debtor's Amended Disclosure Statement and Plan, and finds that the same, despite the Court's direction, contain confusing information which in large part is difficult to comprehend. To the extent one can draw any reasoned conclusion from the information presented by the Debtor to the Court and to the Debtor's creditors, one can only

[1] The United States Trustee is an official of the U.S. Department of Justice and responsible for supervising the administration of all Chapter 11 bankruptcy cases. See 28 U.S.C. § 586 (1994). The United States Trustee has standing to move to convert or dismiss a Chapter 11 case under Sections 307 and 1112(b) of the Bankruptcy Code.

> conclude that the information indicates that the Debtor's law practice is marginal and/or break even, and with net income barely sufficient for the Debtor to support himself at or above a poverty subsistence level. In the face of such evidence, and the Court finding itself in agreement that the Debtor, despite repeated opportunity, has failed to adequately address the objections of the United States Trustee regarding his conduct as a Chapter 11 Debtor-in-possession, the Court finds that good cause exists for dismissal of this case under 11 U.S.C. § 1112(b)(2)(3)(4)(5) & (10).

In re Richard T. Brown, Bankr. No. 96-30290, at 1 n.1 (Bankr. E.D. Pa. (Nov. 25, 1997).

II. STANDARD OF REVIEW

This court has jurisdiction over appeals from final judgements, orders and decrees from the bankruptcy court. See 28 U.S.C. § 158 (1994). In an appeal from an order of the bankruptcy court, the district court conducts plenary review of legal conclusions and applies the clearly erroneous standard to factual findings. See Fed. R. Bankr. P. 8013 ("[T]he district court ... may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."); Meridian Bank v. Alten, 958 F.2d 1226, 1229 (3d Cir. 1992) (finding that the district court "applies a clearly erroneous standard to findings of fact, conducts plenary review of

conclusions of law, and must break down mixed questions of law and fact, applying the appropriate standard to each component"); In re Brown, 951 F.2d 564, 567 (3d Cir. 1991) ("In an appeal from an order of a bankruptcy judge, a district court applies the clearly erroneous test to factual findings and plenary review to questions of law.").

The "clearly erroneous" standard under Bankruptcy Rule 8013 is the same as the standard under Federal Rule of Civil Procedure 52(a). See In re B. Cohen and Sons Caterers, Inc., 108 B.R. 482, 484 n.1 (E.D. Pa. 1989). "A finding [of fact] is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948).

III. DISCUSSION

A. Dismissal of Chapter 11 Case

1. Inadequate Notice

Defendants argues that the United States Trustee's failure to give notice of the motion and hearing to all creditors, as required by 11 U.S.C. § 1112(b), was reversible error because the Bankruptcy Court could not consider the creditor's interests in deciding the Motion to Dismiss on the merits. The United States Trustee filed the Motion to Dismiss the Chapter 11 case on April 4,

1997 and served a copy on the Appellant on April 10, 1997. The United States Trustee admits that notice of the motion and hearing were not served on the creditors, but notes that the omission was inadvertent. The United States Trustee also states that failure to give notice to the creditors was not reversible error.

This Court agrees that failure to give creditors notice of the dismissal was not reversible error because Appellant lacks standing to raise this issue. See In re Argus Group 1700, Inc., 206 B.R. 757, 764 (E.D. Pa. Feb. 13, 1997) (holding that debtor lacked standing to raise the argument that the Bankruptcy Court committed reversible error by failing to give creditor notice of sua sponte dismissal). Appellant argues that "this failure later prejudiced the creditors because their interests were not considered by court" in dismissing the Chapter 11 case. See Appellant Br. at 2. However, Appellant received notice of the dismissal proceedings and all parties received notice of the entry of dismissal. No creditor objected to failure to receive notice of the dismissal hearing. Moreover, this Court is not persuaded that the presence of any creditor at the dismissal hearing would change the Bankruptcy Court's decision because it had a sufficient record to make a decision. Therefore, this Court finds that the failure to notice any creditor was not reversible error.

2. <u>Dismissal on the Merits</u>

Appellant next argues that the Bankruptcy Court committed error in dismissing the case on the merits. The Bankruptcy Court dismissed Appellant's Chapter 11 case under 11 U.S.C. § 1112(b). This Section provides:

> (b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including--
>
> (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
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> (2) inability to effectuate a plan;
>
> (3) unreasonable delay by the debtor that is prejudicial to creditors;
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> (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
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> (5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;
>
> (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
>
> (7) inability to effectuate substantial consummation of a confirmed plan;
>
> (8) material default by the debtor with respect to a confirmed plan;
>
> (9) termination of a plan by reason of the occurrence of a condition specified in the plan; or
>
> (10) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C. § 1112(b)(1)-(10) (1994). Thus, Section 1112 requires a two step analysis. First, the Court must conclude that there is cause. See In re Mazzocone, 180 B.R. 782, 785 (E.D. Pa. 1995). Second, the Court must conclude that dismissal or conversion is warranted depending on the best interests of the creditors. See id.

a. Cause

In the present case, the Court finds that the Bankruptcy Court correctly found that "cause" existed under Sections 1112(b)(2), (3), (4), (5), and (10). The record is replete with examples of Appellant's failure to reorganize his financial affairs within the more than generous time period provided by the Bankruptcy Court. For instance, Appellant failed to file a plan within a reasonable period of time. The Bankruptcy Court provided Appellant numerous time frames in which to submit his plan. Indeed, Appellant finally submitted a plan eight months after the petition date and only after the United States Trustee filed the Motion to Dismiss. Moreover, the Bankruptcy Court sustained objections made to this plan and ordered Appellant to make amendments. Appellant again delayed the submission of amendments for several months. The Bankruptcy Court found, and this Court concurs, that Appellant's unreasonable delay was sufficient cause to dismiss his case.

Furthermore, Appellant failed to submit operating reports on a monthly basis as required because he was a debtor-in-possession. This failure prevented the United States Trustee and other creditors to monitor Appellant's financial performance. Appellant, when questioned as to his failure to submit these reports, did not offer sufficient excuse to justify his failure to submit the reports.

Finally, Appellant was unable to effectuate the plan that he did submit. The Bankruptcy Court correctly concluded the Appellant's law practice-- which generated approximately $7,000 in the six months of 1997-- did not generate sufficient funds to pay his living expenses, let alone his creditors. Moreover, this Court agrees with the Bankruptcy's Court determination that the plan is confusing and unclear. Thus, given Appellant's unreasonable failure to submit a timely and clear plan and Appellant's lack of sufficient funds to effectuate any such plan, this Court finds that the Bankruptcy Court properly concluded that "cause" existed to dismiss Appellant's Chapter 11 case.

b. <u>Best Interest</u>

Appellant also argues that, even if there was sufficient cause, the Bankruptcy Court should have converted the case to a Chapter 7 proceeding rather than dismissed it. The only argument offered by the Appellant, however, is that the Bankruptcy Court "did not undertake the second step" of determining if dismissal,

rather than conversion, was in the best interest of the creditors as required by 11 U.S.C. § 1112(b). This Court finds otherwise. A bankruptcy court must not permit a debtor to continue in Chapter 11, expend assets, and delay creditors from exercising available state law remedies if the debtor is unable to reorganize in a manner provided by the Bankruptcy Code. See In re Brown, 951 F.2d at 571 ("[T]here must be 'a reasonable possibility of a successful reorganization within a reasonable time.'" (quoting United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 376 (1988)). Moreover, the Bankruptcy Court found that Appellant advanced no substantive argument in support of conversion. See In re Brown, Bankr. No. 96-30290, at 3 (Bankr. E.D. Pa. Jan. 27, 1998). Chapter 7 allows a trustee to liquidate the assets of an estate who then distributes them to creditors. See In re Conference of African Union First Colored Methodist Protestant Church, 184 B.R. 207, 217 (Bankr. D. Delaware. 1995) ("Rather, the objective of a Chapter 7 case is to cause the appointment of an independent trustee to marshal and liquidate the assets of the estate for pro rata distribution among the classes of creditors."). In this case, Appellant had little income and no assets of value. Thus, the Bankruptcy Court correctly found that converting the case to a Chapter 7 would not serve a legitimate purpose.

B. Relief from the Stay

Appellant argues that the Bankruptcy Court incorrectly granted Appellee UCLC a relief from the automatic stay. The Bankruptcy Court granted the relief based on 11 U.S.C. § 362(d)(1). Appellant's only argument is that Appellee UCLC failed to sustain its burden with respect to the issue of equity in the property. Appellant's arguments with respect to Appellant's burden on the issue of equity are off the mark.

Section 362(d)(1) grants relief from an automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1) (1994). The moving party has the initial burden of producing evidence of cause to grant relief from the automatic stay under Section 362(d)(1). See In re Hinchliffe, 164 B.R. 45, 48-49 (Bankr. E.D. Pa. 1994). The burden of persuasion then shifts to the debtor to establish that the creditor is adequately protected. See In re Colonial Ctr., Inc., 156 B.R. 452, 459 (Bankr. E.D. Pa. 1993). The determination of adequate protection involves a careful balancing of all relevant factors including the value of the collateral, the likelihood it will depreciate over time, the debtor's prospects for a successful reorganization, the debtor's performance under the plan, the balance of hardships between the parties, and whether the creditor's property interest is being unduly jeopardized. See In re Aqua Assocs., 123 B.R. 192, 196-97

(Bankr. E.D. Pa. 1991). Ultimately, the decision to grant relief from the stay is in the sound discretion of the bankruptcy court. See Colonial Ctr., 165 B.R. at 459.

As previously discussed in this opinion, Appellant had little or no income and assets. Moreover, Appellant could not propose a feasible reorganization plan to the satisfaction of the Bankruptcy Court. Thus, this Court cannot conclude that the Bankruptcy Court abused its discretion in concluding that cause existed to grant a relief from the stay in order to protect the Appellee UCLC's interest in Appellant's property.

C. Adversary Proceeding

Appellant next argues that the loan obtained from Appellee UCLC was a fraudulent conveyance because he did not receive "reasonably equivalent value" in light of the industry charges assessed. Section 548 of the Bankruptcy Code empowers the trustee to avoid conveyances made with fraudulent intent. A conveyance is constructively fraudulent if: 1) the debtor was insolvent on the date of the transfer or 2) the debtor received less than "a reasonably equivalent value" in exchange for the transfer; and 3) the transfer is made within one year prior to filing the bankruptcy petition. See 11 U.S.C. § 548(a) (1994); see also In re Brosby, 109 B.R. 113, 121 (Bankr. E.D. Pa. 1990), aff'd, 1992 WL 21362, at *3 (E.D. Pa. Jan. 27, 1992); In re Metro Shippers, Inc., 78 B.R. 747 (Bankr. E.D. Pa. 1987).

This Court agrees with the Bankruptcy Court that Appellant received reasonably equivalent value for his mortgage and any fees incurred. With the loan, Appellant was able to retire two pre-existing liens against his house, retire credit card debt, and obtain further credit to operate his practice of law. Any charges incurred were standard and hardly make the transaction fraudulent.

D. Sanctions

The final matter before this Court is the Bankruptcy Court's award of sanctions under Rule 9011 against Appellant and the Bankruptcy Court's denial of sanctions under Rule 9011 against Appellee UCLC. Bankruptcy Rule 9011 is analogous to Federal Rule of Civil Procedure 11, containing modifications as are appropriate in bankruptcy matters. See In re Case, 937 F.2d 1014, 1022 (5th Cir. 1991). Accordingly, review of the bankruptcy court awards of Bankruptcy Rule 9011 sanctions are conducted under "the same standard applicable to an order of sanctions under Rule 11." In re Akros Installations, Inc., 834 F.2d 1526, 1531 (9th Cir. 1987). Thus, as in Rule 11 cases, the imposition of sanctions is reviewed pursuant to Bankruptcy Rule 9011 using the abuse of discretion standard. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 384 (1990); Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers, 855 F.2d 1080, 1092 (3d Cir. 1988).

The Third Circuit held that Rule 11 sanctions are warranted where an attorney or party has signed a pleading that

results in an abuse of litigation or misuse of the court's process and in cases involving frivolous motions. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987). Sanctions may be imposed where a party files an action for an improper purpose, such as harassment or undue delay. See id. Rule 11 sanctions, however, are not appropriate when a party's only fault was being on the losing end of a ruling or judgment on the merits. See id. at 483.

1. Denial of Sanctions Against Counsel for Appellee UCLC

In response to Appellant's adversary action challenging the propriety of the mortgage fees, the Bankruptcy Court directed that the parties circulate pretrial statements. Counsel for Appellee UCLC called Appellant to inquire when he intended to file his pretrial statement because it was already late. Appellant told Counsel for Appellee UCLC that he had not "focused" on the matter. Counsel for Appellant UCLC then instructed his staff to file his pretrial statement and a Motion in Limine the next weekday morning. This motion asked the Bankruptcy Court to exclude Appellant's evidence because it had not been provided in advance of appropriate deadlines. Over the weekend, Appellant completed his pretrial statement and faxed a copy to the offices of Counsel for Appellee UCLC. Upon learning that Appellant filed a pretrial statement, Counsel for Appellee UCLC then requested to withdraw his Motion in Limine. The Bankruptcy Judge permitted this withdrawal.

Nevertheless, Appellant accused Counsel for Appellee UCLC of making the untrue statement in his motion that Appellant had not filed a pretrial statement. Appellant sought sanctions against Appellee UCLC under Rule 9011 for this allegedly false statement made in Appellee UCLC's pretrial statement. The Bankruptcy Court denied this request.

This Court cannot say that the Bankruptcy Court abused its discretion in denying Appellant's motion for sanctions. Counsel for Appellee UCLC appropriately filed a Motion in Limine to exclude Appellant's evidence because Appellant failed to file the required pretrial statement. After learning that Appellant did file a pretrial statement, counsel withdrew his motion. Counsel acted properly and, moreover, any alleged false statements in counsel's motion were true at the time the motion was written and filed. Therefore, this Court affirms the Bankruptcy Court's decision not to award sanctions.

2. Award of Sanctions Against Appellant

As indicated, the Bankruptcy Judge's determination that the Appellant filed a frivolous adversary proceeding in order to avoid the fees in connection with his mortgage is supported by the record. Appellant took no discovery, requested no documents, brought no witnesses to the hearing, and did not know whether he looked at Third Circuit case law prior to filing the adversary proceeding. The Appellant admitted as much at the hearing. See R.

at 10, 13 (1/15/98). Thus, the sanctions imposed were not an abuse of discretion.

Finally, Appellant argues that the sanctions are improper because the Bankruptcy Court did not have jurisdiction to award sanctions after it had dismissed the action. This argument is without merit. A district court retains jurisdiction to entertain and decide a sanction motion after dismissal of a lawsuit by the sanctioned party. See Schering Corp. v. Vitarine Pharms., Inc., 889 F.2d 490, 494 (3d Cir. 1989).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re RICHARD T. BROWN, JR., Debtor-Appellant	:	
	:	CIVIL ACTION No. 97-5302
	:	
	:	
	:	Bankruptcy No. 96-30290

O R D E R

AND NOW, this 15th day of October, 1998, IT IS HEREBY ORDERED that the decisions of the United States Bankruptcy Court are **AFFIRMED**.

BY THE COURT:

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HERBERT J. HUTTON, J.